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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

MARK W. DOBRONSKI,

Case No. **20-cv-12862**

Plaintiff,

Honorable Robert H. Cleland,
United States District Judge

v.

Honorable David R. Grand,
United States Magistrate Judge

**MANASSEH JORDAN MINISTRIES,
INC., et al.,**

Defendants.

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**PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT YTEL, INC.'S AMENDED MOTION
TO DISMISS YTEL, INC. DUE TO
LACK OF PERSONAL JURISDICTION**

Plaintiff MARK W. DOBRONSKI, appearing *in propria persona*, pursuant to E.D. Mich. LR 7.1(c), hereby responds to Defendant Ytel, Inc.'s Amended Motion to Dismiss Ytel, Inc. Due to Lack of Personal Jurisdiction [ECF No. 6].

As an initial matter, at no time did counsel for Defendant Ytel, Inc. ("Ytel") conduct a conference with Plaintiff wherein counsel for movant requested

concurrence in any motion, as is required by E.D. Mich. LR 7.1(a). For this reason alone, this Court should deny Defendant Ytel's motion.

Defendant Ytel seeks to dismiss the Complaint against Ytel pursuant to Fed. R. Civ. P. 12(b)(2) on the basis that this Court lacks personal jurisdiction over Defendant Ytel.

As will be demonstrated in Plaintiff's accompanying Brief in Opposition attached hereto, this Court has personal jurisdiction over Defendant Ytel and the claims as set forth against Ytel in Plaintiff's Complaint.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant Ytel's Motion to Dismiss.

Respectfully submitted,

Dated: November 23, 2020



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**PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT YTEL, INC.'S AMENDED MOTION
TO DISMISS YTEL, INC. DUE TO
LACK OF PERSONAL JURISDICTION**

NOW COMES Plaintiff MARK W. DOBRONSKI, appearing *in propria persona*, and for his Brief in Opposition to Defendant Ytel, Inc.'s ("Ytel") Motion to Dismiss Complaint against Defendant Ytel, Inc. Pursuant to Fed. R. Civ. O. 12(b)(2) on the basis that this Court lacks jurisdiction over the Defendant, states as follows:

STATEMENT OF ISSUES PRESENTED

Under Michigan's long-arm statute, does this Court have limited personal jurisdiction over Defendant Ytel, Inc.?

Defendant says: No.

Plaintiff says: Yes.

MOST CONTROLLING AUTHORITY

Cases

Air Prod. & Controls, Inc. v. Safetech Int'l Inc., 503 F.3d 544, 549 (6th Cir. 2007).

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182 (1985).

Calphalon Corp. v. Rowlette, 228 F.3d 718, 721 (6th Cir. 2000).

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7980-81, 2015 WL 4387780, at *11, ¶ 25.

Serras v. First Tennessee Bank Nat. Ass'n, 875 F.2d 1212, 1214 (6th Cir. 1989).

SFS Check, LLC v. First Bank of Delaware, 990 F.Supp.2d 762, 771 (E.D. Mich. 2013).

Sifers v. Horen, 188 N.W.2d 623, 627, 385 Mich. 195, 205 (Mich. 1971).

Yoost v. Caspari, 295 Mich. App. 209, 224-5, 813 N.W.2d 783, 792 (Mich.App 2012).

Federal Rules

Fed. R. Civ. P. 12(b)(2)

Statutes

M.C.L. 600.715

INTRODUCTION

Procedural Background

On September 23, 2020, Plaintiff initiated this case in the State of Michigan, 22nd Judicial Circuit Court, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, the Michigan Home Solicitation Sales Act, M.C.L. § 445.111, *et seq.*, the Michigan Telephone Companies as Common Carriers Act, M.C.L. § 484.101, *et seq.*, the Michigan Uniform Voidable Transactions Act, M.C.L. § 566.31, *et seq.*, and civil conspiracy, by and amongst the 29 named defendants. [ECF No. 1-2].

On October 26, 2020, this matter was removed from the State of Michigan, 22nd Judicial Circuit Court, to this Court. [ECF No. 1].

Subsequent to the removal, to date, six (6) defendants have been defaulted for failure to answer or respond to the complaint,¹ sixteen (16) defendants have filed 4 motions to dismiss;² and 5 more defendants have between now and November 25,

¹ Defaulted defendants include: Manasseh Jordan Ministries, Inc. [ECF No. 31]; Zoe Ministries, Inc. [ECF No. 15]; Kingdom Ministries Church, Inc. [ECF No. 16]; MJ Ministries LLC [ECF No. 30]; Elijah Bernard Jordan a/k/a E. Bernard Jordan [ECF No. 13]; and, Debra Ann Jordan [ECF No. 14].

² Defendants having filed motions to dismiss include: YTEL, Inc. [ECF Nos. 4 and 6]; Robert Alan Seibel [ECF No. 5]; David Few and RAS Realty Management LLC [ECF No. 33]; Charlie Berrian and Vessels of Oil Ministries, Inc. [ECF No. 34]; Carlington Management Associates, Inc., Natasha A. Christian, Jonothan D. Foreman, Aaron B. Jordan, Frank Peter Juliano, Luther Clyde McKinstry III, Santander Holdings LLC, Serving Hands Community Development Corporation, Jesse Dean Spencer, and Worship Center of Atlanta, Inc. [ECF Nos. 37 and 44].

2020 to file answers or responsive pleadings.³

On November 2, 2020, Defendant Ytel, Inc. (“Ytel”) filed Defendant Ytel, Inc.’s Motion to Dismiss Ytel, Inc. Due to Lack of Personal Jurisdiction [ECF No. 4].

On November 3, 2020, Defendant Ytel filed Defendant Ytel, Inc.’s Amended Motion to Dismiss Due to Lack of Personal Jurisdiction [ECF No. 6].

Discussion

A. Legal Standard - Lack of Personal Jurisdiction - Rule 12(b)(2).

Defendant Ytel’s motion is brought pursuant to Fed. R. Civ. P. 12(b)(2). The case law establishes a settled procedural scheme to guide trial courts in the exercise of its discretion when considering a Rule 12(b)(2) motion. The 6th Circuit, in *Air Prod. & Controls, Inc. v. Safetech Int’l, Inc.*, 503 F.3d 544, 549 (6th Cir. 2007) opined:

“In the context of a Rule 12(b)(2) motion, a plaintiff bears the burden of establishing the existence of jurisdiction. *Serras v. First Tenn. Bank Nat’l Ass’n*, 875 F.2d 1212, 1214 (6th Cir.1989). Where... the district court relies solely on written submissions and affidavits to resolve a Rule 12(b)(2) motion, rather than resolving the motion after either an evidentiary hearing or limited discovery, the burden on the plaintiff is “relatively slight,” *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir.1988), and “the plaintiff must make only a prima facie showing that

³ The 5 served defendants not-yet-in-default that have not filed answers or responsive pleadings to date are: Steven Sledge, MJ Ministries Spreading the Gospel, Inc., Virtual Global Consultancy Group LLC, Naomi D. Cook, and Wendy Ekua Dacruz.

personal jurisdiction exists in order to defeat dismissal,” *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir.1991). In that instance, the pleadings and affidavits submitted must be viewed in a light most favorable to the plaintiff, and the district court should not weigh “the controverting assertions of the party seeking dismissal.” *Id.* at 1459.”

Air Prod. & Controls, Inc., 503 F.3d at 549.

The 6th Circuit, in *Theunissen* went further to state:

“The court's treatment of a motion under Rule 12(b)(2) mirrors in some respects the procedural treatment given to a motion for summary judgment under Rule 56. For example, the pleadings and affidavits submitted on a 12(b)(2) motion are received in a light most favorable to the plaintiff. *Serras*, 875 F.2d at 1214; *Welsh*, 631 F.2d at 439. In sharp contrast to summary judgment procedure, however, the court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal. *Serras*, 875 F.2d at 1214; accord *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2nd Cir.1981). We adopted this rule in *Serras* in order to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts, as the Appellee has done in the case before us. *Id.*; accord *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir.1977). In *Serras*, we stated that the defendant who alleges facts to defeat jurisdiction has recourse to the court's discretionary authority to hold an evidentiary hearing if he disputes the plaintiff's factual assertions. *Serras*, 875 F.2d at 1214.” (Emphasis as in original.)

Theunissen, 875 F.2d at 1459.

“[A] court may take judicial notice of its own records in other cases, as well as

the records of an inferior court in other cases,” *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) (citing 9 Wright and Miller, *Federal Practice and Procedure* s 2410, at 359–61 (1971); *Kasey v. Molybdenum Corp. of America*, 336 F.2d 560 (9th Cir. 1964).

Significantly, Ytel has been previously haled into court for the identical misconduct alleged in the instant case, and coincidentally, also involving the same principal as in the instant case, to wit: Manasseh Jordan Ministries, Inc. (“MJM”). Defendant Ytel in the course of the other case made a similar Rule 12(b)(2) motion to dismiss alleging lack of personal jurisdiction. See *De la Cabada v. Ytel, Inc.*, 2020 WL 1156909 (N.D.Cal., 2020). A copy of the *De la Cabada* order is attached hereto at Exhibit A. In that case, Magistrate Judge Corley found that the Court had personal jurisdiction over Defendant Ytel. And, so too, should this Court in this case.

B. Unfounded Personal Attack.

Defendant Ytel begins its motion brief with a lack of civility by making a gratuitous personal attack upon Plaintiff. Plaintiff has not stooped to Ytel’s level and accused anyone of engaging of barratry or champerty. It is a fact that Plaintiff has filed a number of lawsuits arising under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* -- this being one -- but, each and every lawsuit has one common denominator: the defendants telephoned Plaintiff in *violation of the law*; Plaintiff did

not telephone them.

Plaintiff's telephones – like most consumers in America – have been besieged with intrusive calls from telemarketers. [ECF No. 1, Complaint, ¶ 65]. The United States Congress explicitly found that robo-calling is an invasion of privacy. Section 2 of Pub. L. 102-24. In response, the Congress enacted the TCPA, intentionally creating a legally enforceable bounty system, not unlike *qui tam* statutes, to incentivize the assistance of aggrieved private citizens to act as 'private attorneys general' in enforcing federal law. *Alea London Ltd. v. American Home Services, Inc.*, 638 F.3d 768, 778 (C.A.11,2011); *Arnold Chapman and Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489 (7th Cir.2014). The TCPA is a “bounty” statute. *Palm Beach Golf Center-Boca, Inc. v. Sarris*, 771 F.3d 1274, 1283 (C.A.11,2014). There is no common law principle that someone who discovers a violation of law that caused him no harm can nevertheless sue the violator for the latter's profit from the violation; there are plenty of bounty-hunter statutes. *Schlueter v. Latek*, 683 F.3d 350, 356 (C.A.7,2012). While [defendant] is understandably frustrated by [plaintiff's] efficacy, [plaintiff] is doing exactly what Congress intended – enforcing the law. *Mey v. Venture Data, LLC*, 245 F. Supp. 3d 771 (N.D. W. Va. 2017).

C. Defendant Ytel's Misconduct

Plaintiff has alleged in his Complaint that:

“The Defendants have joined together and made an agreement to form a partnership or concert of action in which each member becomes the agent or partner of every other member and engage in planning or agreeing to commit some act or aiding and abetting in the furtherance of the overall scheme.” [ECF No. 1-2, Complaint, ¶ 74].

“The scheme involves initiating illegal robocalls to millions of households across the United States, with recorded messages preaching that God has shared information with the Defendants, typically involving money coming to the consumer, and for a “seed” (monetary donation) the Defendants will share the “prophecy” with the called party.” [ECF No. 1-2, Complaint, ¶ 76].

As to Defendant Ytel, specifically, Plaintiff has alleged:

“Defendant Ytel provides the automated telephone dialing system (robocalling) platform utilized by the Defendants to initiate the prerecorded voice message calls.” [ECF No. 1-2, Complaint, ¶ 136].

“Defendant Ytel knowingly and overtly participates in the scheme by facilitating the illegal “spoofing” of telephone numbers and blocking of Caller ID of the outbound “robocalls” and initiating the calls on behalf of the Defendants to consumers, *en masse*.” [ECF No. 1-2, Complaint, ¶ 137].

“Defendant Ytel, despite being fully aware of the FCC citations issued against Defendants ZMI, MJM, and Yakim, and the numerous lawsuits having been filed against various of the Defendants, all stemming from TCPA violations, nonetheless continues to aid, abet and

facilitate the Defendants by providing them with Ytel's "robocalling" platform and engineering the Caller ID spoofing and blocking functionality." [ECF No. 138, Complaint, ¶ 138].

Between March 18, 2019 and July 15, 2019, Defendant received no less than 81 *illegal* recorded message robocalls to his cellular telephones in which the voice of Defendant Yakim Manasseh Jordan is heard seeking "seed" in order to receive his prophetic message. [ECF No. 1-2, Complaint, ¶¶ 146-148].

Significantly, nowhere in its motion does Ytel deny that it is involved in the robocalling alleged in the Complaint. Instead, Ytel demurs that "Ytel's platform cannot 'spoof' calls"; "telephone calls are *initiated* by Ytel's customers, not by Ytel", and "Ytel has no involvement in the selection of telephone numbers called by its customers." [Motion, p. 1]. Ytel's defense is akin to an individual who provides a handgun to a second individual who has indicated his intent to commit murder and that second individual commits the murder; and then the first person then claims that they cannot be held liable because it was the second individual that pulled the trigger on the handgun.

In fact, and contrary to Ytel's averments, Ytel actively promotes that one of of the features of Ytel's platform is the ability to "spoof" calls. The Federal Communications Commission defines "spoofing" as follows:

"Spoofing occurs when a caller maliciously transmits false

caller ID information to increase the likelihood that you'll answer. Scammers often spoof local numbers, private companies, government agencies and other institutions.”

[Source: <https://www.fcc.gov/scam-glossary>]. On Ytel’s own website, Ytel boldly advertises:



Local Numbers

Establish a local presence by using a phone number that matches our residents area code

[Source: <https://www.ytel.com/products>].

The FCC has made clear the requirements regarding transmitting of caller identification information at 47 C.F.R. 64.1601(e)(1), which promulgates:

“(e) Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(10) must transmit caller identification information.

(1) For purposes of this paragraph, caller identification information must include either CPN or ANI, and, when available by the telemarketer's carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller's customer service telephone number. **The telephone number so provided must permit any individual to make a do-not-call request during regular business hours.**” [Emphasis added.]

In this instant matter, the caller identification information provided did not include

the telemarketer's name and the telephone numbers displayed were outbound only and would not allow a call back, let alone to permit a do-not-call request. [ECF No. 1-2, Complaint, ¶ 265].

In another TCPA case involving co-defendant MJM -- *Craig Cunningham v. Manasseh Jordan Ministries, Inc., et al.*, Case No. 4:19-cv-00494 (U.S.D.C. E.D. Texas) -- in response to a subpoena, Ytel provided a listing of the caller identification numbers supplied by Ytel to enable MJM's "local number" robocalling. See Exhibit B, attached hereto. A review of the produced data shows that Ytel supplied over 285 spoofed Michigan telephone numbers to MJM, broken down by North American Numbering Plan area code, as follows:

<u>Area Code</u>	<u>Numbers</u>	<u>Area Code</u>	<u>Numbers</u>
231	36	616	20
248	27	734	23
269	25	810	19
313	26	906	18
517	31	947	17
586	9	989	34

The FCC has clarified who "makes a call" under the TCPA and is thus liable for any TCPA violations, as follows:

"Specifically, a "direct connection between a person or entity and the making of a call" can include "tak[ing] the steps necessary to physically place a telephone call." It also can include being "so involved in the placing of a specific telephone call" as to be deemed to have initiated it. Thus, we look to the totality of the facts and circumstances

surrounding the placing of a particular call to determine: 1) who took the steps necessary to physically place the call; and 2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA... Depending upon the facts of each situation, these and other factors, such as the extent to which a person willfully enables fraudulent spoofing of telephone numbers or assists telemarketers in blocking Caller ID, by offering either functionality to clients, can be relevant in determining liability for TCPA violations. Similarly, whether a person who offers a calling platform service for the use of others has knowingly allowed its client(s) to use that platform for unlawful purposes may also be a factor in determining whether the platform provider is so involved in placing the calls as to be deemed to have initiated them.”

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7980–81, 2015 WL 4387780, at *11, ¶ 25.

In the instant case, Ytel’s defense is that “Ytel has no contacts with the State of Michigan.” Ytel’s assertion is disingenuous. In fact, Ytel willfully and knowingly facilitated MJM’s illegal robocalling activities by procuring and supplying MJM with spoofed Michigan telephone numbers in order to create a faux “local presence” so that the robocalls would evade call blocking systems and algorithms. And, it is significant that despite Ytel being well aware of the fact that co-defendant MJM was engaged in illegal robocalling activities, Defendant Ytel continued to supply the platform and the spoofing capabilities to co-defendant MJM so that the overall

scheme may continue. At any time, Ytel had the ability to “pull the plug” on MJM’s illegal robocalling, but it did not do so. In fact, Defendant Ytel did nothing to stop those illegal activities and continued to reap the profits from same. Ytel is so intimately involved in the illegal robocalling activities alleged, that Ytel is deemed to have made the calls and is thus liable under the TCPA.

D. The Court may properly exercise personal jurisdiction over Defendant Ytel for violations of the TCPA

The Court may exercise limited personal jurisdiction over an individual if that person transacts any business within the state, does or causes an act to be done, or consequences to occur here. *SFS Check, LLC v. First Bank of Delaware*, 990 F.Supp.2d 762, 771 (E.D. Mich. 2013). Where an out-of-state agent is actively and personally involved in the conduct giving rise to the claim, the Court may exercise personal jurisdiction when traditional notions of fair play and substantial justice so dictate. *Flagstar Bank, FSB v. Centerpointe Financial, Inc.*, No. 2-10-CV-14234, 2011 WL 2111984, *3 (E.D. Mich.2011). For the reasons that follow, the Court should find the pleadings in the Complaint satisfy this standard.

Under Rule 12(b)(2), the plaintiff’s burden is merely that of making a prima facie showing that personal jurisdiction exists; if plaintiff meets that burden the motion to dismiss should be denied, “notwithstanding any controverting presentation by the moving party.” Any other rule would empower a defendant to defeat personal

jurisdiction merely by filing a written affidavit contradicting jurisdictional facts alleged by a plaintiff. *Serras v. First Tennessee Bank Nat. Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989).

Michigan's long-arm statute provides for jurisdiction over a corporation which transacts *any* business within the state. M.C.L. § 600.715(1). This Court has given plain meaning to this provision, noting "the Michigan Supreme Court has held that the word 'any' in M.C.L. § 600.715(1) 'means just what it says'; it includes each and every act in this state, and is satisfied by even 'the slightest act of business in Michigan'" *Alisoglu v. Central States Thermal King of Oklahoma, Inc.*, No. 12-CV-10230, 2012 WL 1666426, *4 (E.D. Mich. 2012). See also, *Lanier v. American Board of Endodontics*, 843 F.2d 901, 909-09 (6th Cir. 1988).

Case law is legion that the placement of telephone calls constitutes transaction of business in Michigan within the meaning of Michigan's long-arm statute. *Alisoglu v. Central States Thermal King of Oklahoma, Inc.*, No. 12-CV-10230, 2012 WL 1666426, *4 (E.D. Mich. 2012) (defendant transacted business in Michigan when its employee(s) communicated with Plaintiffs through e-mail and telephone calls); *Neogen Corp. v. New Gen Screening*, 282 F.3d 883, 888 (6th Cir. 2002) (defendant transacted business in Michigan through mail and web-based contact); *Lanier v. American Board of Endodontics*, 843 F.2d 901, 908 (6th Cir. 1988) (Illinois defendant

“transacted business” in Michigan through mail and telephone contacts with Michigan residents); *Dedvukaj v. Maloney*, 447 F.Supp.2d 813 (E.D. Mich. 2006) (requirements of long-arm statute satisfied where defendant communicated with Michigan plaintiff through email and phone). Defendant Ytel is so involved with the robocalls that Ytel is deemed to have made them.

Additionally, the statute also allows courts to exercise limited personal jurisdiction over any corporation which does or causes “any act to be done, or *consequences to occur*, in the state resulting in an action for tort.” M.C.L. § 600.715(2). (Emphasis added.) Interpreted literally, this means that a non-resident defendant who causes injury to occur within Michigan may be subjected to Michigan jurisdiction even though he has never been within the state or himself done any act physically within the state. *Sifers v. Horen*, 188 N.W.2d 623, 627, 385 Mich. 195, 205 (Mich. 1971). For purposes of this provision, a “tort” in the broad sense is the breach of a noncontractual legal duty owed the plaintiff. *Overby v. Johnson*, 418 F.Supp. 471, 473 (E.D. Mich. 1976). The TCPA is a strict liability statute which imposes liability for erroneous unsolicited calls. *Harris v. World Financial Network Nat. Bank*, 867 F. Supp. 2d 888, 894 (E.D. Mich.,2012). Ytel deliberately supplied Michigan telephone numbers to Defendants so that Defendants’ illegal robocalls would be more likely to be answered by unsuspecting consumers.

Here, Plaintiff have alleged sufficient facts to support the assertion of the long-arm statute at this stage, alleging that the defendants engaged in initiating telemarketing calls using an automated telephone dialing system (“ATDS”) to Plaintiff’s cellular telephone for the purpose of hawking MJM’s “prosperity prophecy”. For purposes of their business practices, placing calls constitutes the conducting of “business” for purposes of M.C.L. § 601.715(1); *Alisoglu, supra*. Accordingly, Defendant Ytel purposely transacted “business” in the State of Michigan.

A court disposing of a motion to dismiss for lack of personal jurisdiction does not weigh controverting assertions of party seeking dismissal, because court wants to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing affidavit denying all jurisdictional facts; dismissal on pleadings is proper only if all specific facts which plaintiff alleges collectively fail to state prima facie case for jurisdiction. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996). In the absence of an evidentiary hearing, the court must view the pleadings and affidavits in the light most favorable to plaintiff and not consider the controverting assertions of defendant. *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000) citing *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1272 (6th Cir. 1998). Plaintiff must make only a prima facie showing of personal jurisdiction

in order to defeat dismissal. See *id.*

Because Defendant Ytel is alleged to have engaged in “business” and committed “torts” within the State of Michigan, this court may assert personal jurisdiction over Ytel. For these reasons, the Court should deny the motion.

E. Defendant Ytel’s alleged conduct in committing violations of the TCPA satisfy constitutional requirements

The ability to exercise personal jurisdiction arises when the defendant has “minimum contacts” with the forum state so as to not “offend traditional notions of fair play and substantial justice.” *International Shoe v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 157 (1945). The Supreme Court reiterated the importance of “affiliation between the forum and the underlying controversy, principal, [an] activity or an occurrence that takes place in the forum state.” *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773, 1780, 198 L.Ed.2d 395 (2017). “‘Specific’ or ‘case-linked’ jurisdiction depends on an affiliation between the forum and the underlying controversy.” *Walden v. Fiore*, 134 S.Ct. 1115, 1122 n.6 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011)). Neither the *Bristol* case nor the *Walden* case stand for the proposition that individuals that commit violations in one state can simply retreat to their state. It is not a necessary condition for personal jurisdiction that the defendants be physically present within

the jurisdiction. *Knight Capital Partners Corp. v. Henkel AG & Company, KGAA*, 257 F.Supp.3d 853, 862 (E.D. Mich. 2017).

Courts utilize a three-part test to determine personal jurisdiction and its requirements are that: (1) the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise from the defendant's activities there; and, (3) the acts of the defendant of consequences cause by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000) (quoting *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)).

Within the context of TCPA cases, the same argument being raised by Defendant Ytel has been rejected numerous times. Sending a message into the forum state in violation of the TCPA is sufficient to confer personal jurisdiction over the defendant. *Mais v. Gulf Coast Collection Bureau, Inc.*, 2013 WL 1283885 (S.D. Fla. 2013). *See, e.g., Payton v. Kale Realty, LLC*, 2014 WL 4214917, *4 (N.D. Ill. 2014); *Luna v. Shac, LLC*, 2014 WL 3421514, at *4 (N.D. Cal. 2014); *Baker v. Caribbean Cruise Line, Inc.*, 2014 WL 880634, at *2 (D. Ariz. 2014); *Hudak v. Berkley Group, Inc.* 2014 WL 345676, at ** 2-3 (D. Conn. 2014); *Heidorn v. BDD Mktg. & Mgmt.*

Co., LLC, 2013 WL 6571629 (N.D. Cal. Aug 19, 2013), report and recommendation adopted, 13-CV-00229-YGR, 2013 WL 6571168 (N.,D. Cal. Oct, 9, 2013).

Despite there being no dearth of cases permitting the exercise of long-arm jurisdiction, the Defendants argue that the Court may not exercise that jurisdiction here. Defendants' motion must be denied.

F. The individual defendants have purposefully availed themselves of this forum and caused a violation in Michigan.

To purposefully avail oneself, “a defendant need not be physically present or have physical contacts with the form, as long as its efforts are ‘purposefully directed’ toward forum residents.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182 (1985). A single contact with a forum state may confer personal jurisdiction if it is directly and substantially related to the plaintiff's claim. *Vanderberg & Sons Furniture*, 2013 WL 504168, * 4 (W.D. Mich. 2013). Sending fraudulent communications into a forum state constitutes purposeful availment. *Neal v. Janssen*, 2760 F.3d 328, 332 (6th Cir. 2001). The acts of making phone calls and sending facsimiles into the forum, standing alone, may be sufficient to confer jurisdiction on the foreign defendant where the phone calls and faxes form the bases for the action. *Id.*

In this case, Plaintiff alleges that the Defendants – including Ytel – “are engaged in, *inter alia*, telemarketing activities utilizing automated telephone dialing

systems and prerecorded voice messages to contact consumers offering to sell prophetic messages and financial miracles which they claim to have received from God.” [ECF No. 1-2, Complaint, ¶ 58]. Further, Plaintiff has alleged a civil conspiracy where “[t]he Defendants have joined together and made an agreement to form a partnership or concert of action in which each member becomes the agent or partner of every other member and engage in planning or agreeing to commit some at or aiding and abetting in the furtherance of the overall scheme.” [ECF No. 1-2, Complaint, ¶ 74]. Defendant Ytel’s participation in the scheme consists of, *inter alia*, their supplying the robocalling platform [ECF No. 1-2, Complaint, ¶ 136], facilitating the illegal spoofing of telephone numbers and blocking of Caller ID of the outbound robocalls and initiating the telephone calls on behalf of the Defendants to consumers, *en masse* [ECF No. 1-2, Complaint, ¶ 137]. The personal liability provisions of the TCPA render this conduct a statutory violation and render them personally responsible for this conduct. In that capacity, the Defendants are responsible for having directed numerous calls to the state of Michigan and specifically to Plaintiff. As such, the Defendants have purposefully availed themselves of the benefits of the state of Michigan to do their telemarketing, and violated the TCPA in the process. Implicitly, the Defendants have purposefully availed themselves and caused a consequence in Michigan in violation of the TCPA.

G. Defendant Ytel's participation in the civil conspiracy subjects it to the long arm jurisdiction of Michigan

Michigan recognizes the conspiracy theory of jurisdiction, which is described as follows:

“Under the ‘conspiracy theory’ of jurisdiction, a conspirator not within the forum state may be subject to the jurisdiction of the forum state on the basis of the acts a coconspirator committed there. The rationale for this rule is that when one member of a conspiracy inflict an actionable wrong in one jurisdiction, the other member should not be allowed to escape being sued there by hiding in another jurisdiction. A prima facie case of conspiracy supporting a finding of personal jurisdiction over a nonresident individual may be established by using reasonable inferences, provided sufficient evidence is introduced to take the inferences out of the realm of conjecture, but jurisdiction may not be asserted if the person bringing an action against the nonresident fails to establish such a prima face case.”

1 Mich. Pl. & Pr. § 2:33 (2d ed.). See, e.g., Yoost v. Caspari, 295 Mich. App. 209, 224-5. 813 N.W.2d 783, 792 (2012). See also, General Motors Corp. v. Ignacio Lopez de Arriortua, 948 F.Supp. 656, 665 (E.D. Mich.1996). Because Defendant Ytel is shown to have participated in the conspiracy, Defendant Ytel should be subject to long arm personal jurisdiction in Michigan.

H. Ytel's claim for sanctions is without merit

Defendant Ytel began its motion with a gratuitous attack upon Plaintiff, and closed its motion with another personal attack upon Plaintiff. In closing, Ytel asserts

that “Plaintiff improperly and frivolously seeks jurisdiction over Ytel in Michigan” and states that it will be seeking sanctions under Fed. R. Civ. P. 11. [ECF No. 6, p. 7].

The central purpose of Rule 11 is to deter baseless filings in the district court. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Rule 11 permits sanctions if “a reasonable inquiry discloses the pleading, motion, or paper is (1) not well grounded in fact, (2) not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay.” *Merritt v. Int’l Ass’n of Mach. and Aerospace Workers*, 613 F.3d 609, 626 (6th Cir.2010). “Rule 11 is intended to deter claims with *no* factual or legal basis at all; creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment.” *Davis v. Carl*, 906 F.2d 533, 538 (11th Cir. 1990) (emphasis in original).

At the time that Plaintiff signed the Complaint in this matter, Plaintiff did so certifying that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the Complaint: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal

contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; and, (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. Most importantly, Plaintiff stands behind that certification and that certification remains true and correct.

Courts look with disfavor on a party's use of Rule 11 or the ethical rules as combative tools; the rules governing the ethical conduct of lawyers are far too important to be trivialized and used in baseless mud-slinging. *Autrey v. U.S.*, 889 F.2d 973, 986 (11th Cir. 1989).

CONCLUSION

For the reasons set forth, *supra*, Plaintiff respectfully requests that this Honorable Court DENY Defendant Ytel, Inc.'s Amended Motion to Dismiss Ytel, Inc. Due to Lack of Personal Jurisdiction.

Respectfully submitted,

Date: November 23, 2020



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CERTIFICATE OF SERVICE

I hereby certify that on **November 23, 2020**, I caused copies of the foregoing *Plaintiff's Response in Opposition to Defendant Ytel, Inc.'s Amended Motion to Dismiss Ytel, Inc. Due to Lack of Personal Jurisdiction* to be served upon all parties and/or attorneys of record to the above-captioned cause herein by sending same in a sealed envelope, with first-class postage fully prepared thereupon, and deposited in the United States Mail, addressed as follows:

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I declare under the penalties of perjury that this Certificate of Service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.



Mark W. Dobronski

EXHIBIT A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LAURA C. DE LA CABADA, et al.,

Plaintiffs,

v.

YTEL, INC.,

Defendant.

Case No. 19-cv-07178-JSC

**ORDER RE: DEFENDANT'S MOTION
TO DISMISS FIRST AMENDED
COMPLAINT**

Re: Dkt. No. 21

United States District Court
Northern District of California

Laura C. De la Cabada and Debra Williams (together, "Plaintiffs") bring this action on behalf of themselves and as a putative class action against Ytel, Inc. ("Ytel" or "Defendant"), alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. (Dkt. No. 20.)¹ Now before the Court is Defendant's motion to dismiss the first amended complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6).² After careful consideration of the parties' briefing and having had the benefit of oral argument on March 5, 2020, the Court DENIES Defendant's motion because the complaint's allegations give rise to a plausible inference that Ytel is liable under the TCPA.

BACKGROUND

I. Complaint Allegations

The gravamen of the complaint is that Ytel, "a cloud-based text messaging and calling system," knowingly facilitated millions of illegal robocalls and robotexts by Manasseh Jordan Ministries and Yakim Manasseh Jordan (together, "MJM") that Plaintiffs received without their

¹ Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

² All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (See Dkt. Nos. 6 & 11.)

1 consent. (*See* Dkt. No. 20 at ¶¶ 1-5.) MJM is “a ‘ministry’ and evangelizer of the so-called
2 ‘prosperity gospel’” that “partnered with Ytel” to make the calls and send the texts at issue. (*Id.* at
3 ¶ 5.) MJM has been “subject to an FCC citation and no fewer than sixteen separate lawsuits since
4 2013,” yet continues its calling and text messaging campaigns “in exclusive partnership with, and
5 with the knowing consent and assistance of, . . . Ytel.” (*Id.*) Plaintiffs allege that Ytel thus
6 violated the TCPA by “knowingly permitting and facilitating this conduct to persist, allowing [its]
7 call platform to be used to effectuate this conduct, and by being substantially involved in placing
8 the spam calls and texts Plaintiffs continue to receive to this day.” (*Id.* at ¶ 6.)

9 **A. The Ytel Systems**

10 Ytel provides its customers with calling and text messaging systems that constitute
11 “automatic telephone dialing system[s]” and are capable of delivering prerecorded voice messages
12 and text messages to consumers’ telephones. (*Id.* at ¶ 22.) The systems have “the capacity to
13 produce the numbers to be called, using a random or sequential number generator, and to dial such
14 numbers.” (*Id.* at ¶¶ 19, 21.) Ytel’s website asserts that its “‘in-house carrier compliance team
15 works directly with [its] customers to ensure that they’re sending messages and running
16 campaigns that are compliant within the standards set by the FTC and TCPA.’” (*Id.* at ¶ 26
17 (quoting <https://ask.ytel.com/ytel-api-sms>)). Despite such oversight, however, “Ytel allowed pre-
18 recorded calls and text messages to be sent without first obtaining prior express consent from
19 customers.” (*Id.* at ¶ 28.)

20 Ytel also “directly participates in executing and calling texting campaigns by bypassing
21 carrier filtering and using deceptive calling tactics.” (*Id.* at ¶ 29.) Specifically, Ytel’s text
22 messaging system provides “short codes,” which are “5 to 6-digit phone number[s],” because they
23 are best used for high volume text messaging campaigns and “are not subject to blocking or
24 filtering by cell phone carriers for heavy volume calling.” (*Id.* at ¶ 30 (citing
25 [https://ask.ytel.com/hubfs/Product/Sales%20Tools/Infographic/2018_03_ShortCodeInfographic.p](https://ask.ytel.com/hubfs/Product/Sales%20Tools/Infographic/2018_03_ShortCodeInfographic.pdf)
26 [df](https://ask.ytel.com/hubfs/Product/Sales%20Tools/Infographic/2018_03_ShortCodeInfographic.pdf)).³ The Ytel system “also allows for the ‘spoofing’ of outgoing phone numbers to match the
27

28 ³ When considering a Rule 12(b)(6) motion to dismiss, a court ordinarily does not look beyond the four corners of the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). “A

1 recipient's local phone number," which "enables its partners to [e]stablish a local presence by
2 using a phone number that matches your recipients [sic] area code." (*Id.* at ¶ 32 (alterations in
3 original) (internal quotation marks omitted).)

4 B. The Communications

5 "Ytel and its tools played an integral role in spamming of millions of phones with recorded
6 messages and texts featuring automated messages from the so-called 'prophet' Yakim Manasseh
7 Jordan." (*Id.* at ¶ 36.) Ytel provided MJM "with custom short codes to avoid being blocked by
8 recipients' cell phone carriers," and "provided MJM with hundreds of local phone numbers in
9 order to place pre-recorded calls to consumers, en masse, and avoid built-in call blocking
10 features." (*Id.*) MJM "has told millions of call recipients, in his own prerecorded voice[:]

11 the Lord spoke to me personally about you. I must speak to you. I'm
12 going to pass the phone to my blessed assistant and he's [going to]
13 give you my blessed number so that you can call me back so that you
14 can hear this blessed word.

15 (*Id.* at ¶ 38 (alterations in original).) "In a Ytel-partnered text messaging campaign, MJM told call
16 recipients that 'GOD is Exposing those that are for you and against you, ALL for YOUR GOOD
17 Listen Click Prophetmanasseh4u.com.'" (*Id.* at ¶ 39.) The recipients of these calls and text

18 court may, however, consider certain materials—documents attached to the complaint, documents
19 incorporated by reference in the complaint, or matters of judicial notice—without converting the
20 motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903,
21 908 (9th Cir. 2003). Here, the FAC cites among other things, Ytel's website. Defendant asserts
22 that because the FAC "includes selective screenshots from Ytel's website, it is appropriate for Ytel
23 to refer to, and for this Court to consider, other parts of Ytel's website for a more robust
24 understanding of Ytel's business." (Dkt. No. 21 at 8 n.2.) Not so. At this stage the Court can
25 only consider the web pages "directly quoted" in the FAC. *See Daniels-Hall v. Nat'l Educ. Ass'n*,
26 629 F.3d 992, 998 (9th Cir. 2010) (taking "into consideration information posted on certain . . .
27 webpages that [p]laintiffs referenced in the [c]omplaint," because "[p]laintiffs directly quoted the
28 material posted on th[ose] web pages, thereby incorporating them into the [c]omplaint"); *see also*
Golden v. Home Depot, U.S.A., Inc., No. 1:18-cv-00033-LJO-JLT, 2018 WL 2441580, at *3 (E.D.
Cal. May 31, 2018) (noting that a complaint's citation to a portion of a website "does not open the
door to [d]efendant's use of unrelated portions of the same website in presenting a motion to
dismiss"); *Greg Young Publ'g, Inc. v. CafePress, Inc.*, 2016 WL 6106752, at *2 (C.D. Cal. Jan.
25, 2016) (noting that although complaint quoted portions of defendant's website, "such
allegations are not a blanket permission to incorporate unrelated information found elsewhere on
[d]efendant's domain"). Indeed, incorporation by reference is improper for material that "merely
creates a defense to the well-pled allegations in the complaint," because such material "does not
necessarily form the basis of the complaint." *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d
988, 1002 (9th Cir. 2018). Accordingly, for purposes of the instant motion the Court considers as
incorporated by reference only those portions of Ytel's website cited in the complaint.

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1 messages “did not consent to be called by Manasseh, MJM, or Ytel.” (*Id.* at ¶ 41.)

2 Plaintiffs received prerecorded calls and text messages attributed to MJM as recently as
3 2019. Plaintiffs “do[] not have a relationship with MJM or Ytel,” and neither Plaintiff has
4 provided MJM or Ytel with her phone number or given them consent to call her phone. (*Id.* at ¶¶
5 53, 56.)

6 **C. The *Molitor* Action**

7 Plaintiff De la Cabada was part of a 2016 class action complaint against MJM for violating
8 the TCPA and in March 2019 she “obtained an individual default judgment against Manasseh and
9 MJM” for those violations. (*See id.* at ¶ 45; *see also Molitor, et al. v. Yakim Manasseh Jordan, et*
10 *al.*, No. 1:16-cv-02106, Order of Default Judgment, Dkt. No. 30 (N.D. Ill. Apr. 29, 2019).)⁴ Ytel
11 was not a party to that action. *See generally Molitor*, No. 1:16-cv-02016, Class Action Complaint,
12 Dkt. No. 11-1 (N.D. Ill. June 20, 2016). Plaintiff De la Cabada does not bring the instant case
13 “based on any calls that were at issue in the prior case.” (Dkt. No. 20 at ¶ 45.) This case concerns
14 only “texts and calls she received after 2017.” (*Id.*)

15 In early 2017, “counsel for Plaintiff De la Cabada provided Ytel with repeat notice of the
16 [*Molitor*] lawsuit, the substance of the allegations, and extensive evidence of the overall conduct
17 of MJM.” (*Id.* at ¶ 47.) Thus, Ytel was aware of MJM’s conduct, “[a]t the very least,” in early
18 2017. (*Id.*) Further, “the FCC issued a citation letter to MJM in 2016” for making calls in
19 violation of the TCPA, (*see id.* at ¶ 43 (citing [https://www.fcc.gov/document/fcc-issues-citation-](https://www.fcc.gov/document/fcc-issues-citation-manasseh-jordan-robocalls-cell-phones)
20 [manasseh-jordan-robocalls-cell-phones](https://www.fcc.gov/document/fcc-issues-citation-manasseh-jordan-robocalls-cell-phones)), and “MJM and Manasseh have also been sued for
21 violating the TCPA no fewer than *sixteen times* since 2013 alone,” (*id.* at ¶ 44). “[D]espite the
22 perpetual legal action against it for making hundreds of millions of illegal calls and texts, MJM,
23 along with Ytel continues to make harassing pre-recorded calls and sends text messages to
24 consumers without first obtaining their prior express consent.” (*Id.* at ¶ 48.)

25 //

26
27 ⁴ Courts may take judicial notice of “undisputed matters of public record, including documents on
28 file in federal or state courts.” *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012).
Accordingly, the Court takes judicial notice of the proceedings in *Molitor, et al. v. Yakim*
Manasseh Jordan, et al., No. 1:16-cv-02106 (N.D. Ill.).

D. The Putative Class

Plaintiffs bring this action individually and on behalf of two distinct classes of similarly situated individuals: (1) the “Pre-Recorded Voice Class,” consisting of “[a]ll persons in the United States who received one or more pre-recorded calls from MJM”; and (2) the “Text Message Class,” consisting of “[a]ll persons in the United States who received one or more text messages from MJM.” (*Id.* at ¶ 57.)

II. Procedural History

Plaintiffs filed their original complaint on October 30, 2019, bringing two TCPA claims against Ytel: (1) violation of 47 U.S.C. § 227(b)(1)(A)(iii) on behalf of Plaintiffs and the Pre-Recorded Voice Class; and (2) violation of same on behalf of Plaintiffs and the Text Message Class. (Dkt. No. 1 at ¶¶ 65-82.) Defendant moved to dismiss the complaint in December 2019, (Dkt. No. 14), and Plaintiffs filed the first amended complaint (“FAC” or “complaint”) on January 16, 2020, (Dkt. No. 20), bringing the same TCPA claims asserted in the original complaint. Defendant filed the instant motion to dismiss two weeks later. (Dkt. No. 21.) The motion is fully briefed, (*see* Dkt. Nos. 23 & 24), and the Court heard oral argument on March 5, 2020.

DISCUSSION

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a complaint as failing to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facial plausibility standard is not a “probability requirement” but mandates “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). Thus, a complaint “that offers labels and conclusions or a formulaic recitation of the elements of a cause of action” is insufficient, as is a complaint that “tenders naked assertion[s] devoid of further factual enhancement.” *Id.* (internal quotation marks and citation omitted).

I. The TCPA

Under section 227(b) of the TCPA it is unlawful for any person in the United States to “make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or

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1 prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service.” 47
 2 U.S.C. § 227(b)(1)(A)(iii). “The three elements of a TCPA claim are: (1) the defendant called a
 3 cellular telephone number; (2) using an automatic telephone dialing system; (3) without the
 4 recipient’s prior express consent.” *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036,
 5 1043 (9th Cir. 2012). A text message falls within the meaning of “to make any call” under the
 6 TCPA. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667, 193 L. Ed. 2d 571 (2016), *as*
 7 *revised* (Feb. 9, 2016).

8 “For a person to ‘make’ a call under the TCPA, the person must either (1) directly make
 9 the call, or (2) have an agency relationship with the person who made the call.” *Abante Rooter &*
 10 *Plumbing v. Farmers Grp., Inc.*, No. 17-cv-03315-PJH, 2018 WL 288055, at *4 (N.D. Cal. Jan. 4,
 11 2018) (citing *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 877-79 (9th Cir. 2014)). Thus,
 12 liability under the TCPA can be either direct or vicarious. Here, Plaintiffs allege only direct
 13 liability; that is, they allege that Ytel “made” the challenged communications.

14 Defendant moves to dismiss the complaint on the grounds that Plaintiffs have not plausibly
 15 alleged that Ytel made the communications. The TCPA does not define the term “make” as used
 16 in 47 U.S.C. § 227(b)(1)(A); however, in July 2015, the FCC issued a declaratory ruling setting
 17 forth interpretative guidance for determining whether an entity “made” a call for purposes of
 18 TCPA liability. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot.*
 19 *Act of 1991*, 30 FCC Rcd. 7961 (2015) (“2015 FCC Declaratory Ruling”), *rev’d in part on other*
 20 *grounds by ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The FCC “look[s] to the totality of
 21 the facts and circumstances surrounding the placing of a particular call to determine: 1) who took
 22 the steps necessary to physically place the call; and 2) whether another person or entity was so
 23 involved in placing the call as to be deemed to have initiated it⁵, considering the goals and
 24 purposes of the TCPA.” *Id.* at 7980.

25
 26 ⁵ Plaintiffs allege that Ytel violated 47 U.S.C. § 227(b)(1)(A), which prohibits “making” certain
 27 calls to cellular telephone numbers. Section (B), 47 U.S.C. § 227(b)(1)(B), prohibits “initiating”
 28 certain calls to landlines. The FCC, however, uses “to make a call” and “to initiate a call”
 interchangeably; that is, the terms have the same meaning and legal effect. *See In the Matter of*
Dialing Servs., LLC, 29 F.C.C. Rcd. 5537, 5542 n.30 (2014); *Shamblin v. Obama for Am.*, No.
 8:13-CV-2428-T-33 TBM, 2015 WL 1754628, at *4 n.2 (M.D. Fla. Apr. 17, 2015).

1 The Court concludes that while Plaintiffs have not plausibly alleged that Defendant
2 *physically* made the communications, they have plausibly alleged that Defendant knowingly
3 allowed MJM to use Ytel's "platform for unlawful purposes" and therefore Ytel "made" the calls.
4 *See* 2015 FCC Declaratory Ruling, 30 FCC Rcd. at 7980-81.

5 **II. Whether Ytel "Made" the Communications**

6 **A. Ytel did not Physically Make the Communications**

7 The complaint contains only conclusory allegations suggesting that Ytel physically made
8 the calls and sent the text messages; specifically:

9
10 Between 2015 and 2017 alone, Ytel and MJM placed over 160 million
illegal robocalls to consumers around the country.

11 ...

12 MJM, along with Ytel, continues to make harassing pre-recorded calls
13 and sends text messages to consumers without first obtaining their
prior express consent.

14 ...

15 Ytel, together with MJM, placed pre-recorded voice calls to
16 Plaintiffs' and the Class members' cellular telephones without their
prior express consent.

17 ...

18 Ytel made pre-recorded voice calls to Plaintiffs' and members of the
19 Class's cellular telephones without obtaining prior express consent.

20 ...

21 Ytel, together with MJM, sent unwanted and unsolicited text
22 messages to Plaintiffs' and the Class members' cellular telephone
without their prior express consent.

23 ...

24 Ytel made text message calls to Plaintiffs' and members of the Class's
cellular telephones without obtaining express consent.

25 (Dkt. No. 20 at ¶¶ 5, 48, 65, 74, 78.) These conclusory allegations do not give rise to a plausible
26 inference that Ytel physically made the calls and sent the texts; indeed, the complaint contains
27 multiple allegations that MJM actually made those communications. (*See id.* at ¶¶ 5, 38, 39, 54,
28 79.) Plaintiffs' opposition does not argue otherwise, and instead asserts that Ytel was so involved

1 in the calling and text messaging campaigns as to have initiated them.

2 **B. Whether Ytel was Otherwise Involved in the Communications**

3 In considering whether an entity was otherwise so involved with a communication as to be
4 deemed to have made it for TCPA liability purposes, the FCC has identified several relevant
5 factors, including: (1) who creates the content of the messages; (2) who decides “whether, when or
6 to whom” a message is sent; (3) “the extent to which a person willfully enables fraudulent
7 spoofing of telephone numbers or assists telemarketers in blocking Caller ID, by offering either
8 functionality to clients”; and (4) “whether a person who offers a calling platform service for the
9 use of others has knowingly allowed its client(s) to use that platform for unlawful purposes.” *See*
10 2015 FCC Declaratory Ruling, 30 FCC Rcd. at 7980-81.

11 There are no factual allegations that plausibly support an inference that Ytel created the
12 content of the communications, or determined when, how, and to whom the communications were
13 sent. Drawing all inferences in Plaintiffs’ favor, however, and based on the totality of the
14 circumstances, Plaintiffs still plausibly allege that Ytel was so involved with the communications
15 as to be deemed to have made them.

16 First, Plaintiffs allege that Ytel assists MJM with spoofing of telephone numbers and
17 blocking of Caller ID. (Dkt. No. 20 at ¶¶ 34 (“Ytel provides random selections of numbers for
18 bulk purchase.”), 35 (alleging that with such phone numbers “telemarketers can place multiple
19 phone calls, each from a different number, to avoid built-in phone number blocking systems,” and
20 “[e]ven if a consumer blocks one phone number, calls can continue unabated from hundreds of
21 other numbers”), 36 (“Ytel provided MJM hundreds of local phone numbers in order to *place* pre-
22 recorded calls to consumers, *en masse*, and avoid built-in call blocking features.”) (emphasis
23 added).)

24 Second, Plaintiff De la Cabada obtained a default judgment against MJM in the *Molitor*
25 lawsuit, six months prior to the filing of this action. (*Id.* at ¶ 45.) Plaintiffs allege that “counsel
26 for Plaintiff De la Cabada provided Ytel with repeat notice of the [*Molitor*] lawsuit, the substance
27 of the allegations, and extensive evidence of the overall conduct of MJM.” (Dkt. No. 20 at ¶ 47.)
28 Plaintiffs also allege that MJM has been sued for TCPA violations 16 times since 2013 and was

1 cited by the FCC in 2016 “for making calls using an automatic telephone dialing system or an
2 artificial or prerecorded voice without first obtaining prior express consent of the caller.” (Dkt.
3 No. 20 at ¶¶ 43, 44.) While Plaintiffs do not allege that they gave Ytel notice of these 16 other
4 lawsuits and the 2016 FCC action, or of the default judgment itself, the complaint plausibly
5 supports an inference that Ytel would have been aware of them given that Ytel advertises that its
6 “in-house carrier compliance team works directly with our customers to ensure they’re sending
7 messages and running campaigns that are compliant and within the standards set by the FTC and
8 TCPA.” (*Id.* at ¶ 26 (quoting <https://ask.ytel.com/ytel-api-sms>)). In other words, given Ytel’s
9 advertised interest in ensuring its customers’ TCPA compliance, the allegations support a
10 reasonable inference that once Ytel was put on notice that its customer had been accused of
11 violating the TCPA, it would have investigated whether there have been other lawsuits or actions
12 taken against the customer, at a minimum by asking the customer itself so that Ytel could ensure
13 that past mistakes are not repeated.

14 In sum, drawing all reasonable inferences in Plaintiffs’ favor, the totality of the allegations
15 support a plausible inference that Ytel was aware of MJM’s repeated TCPA violations and
16 nonetheless continued to facilitate them by offering MJM Ytel’s platform, including with spoofing
17 and call blocking functionality.

18 Defendant’s citation to *Kauffman v. CallFire, Inc.*, 141 F. Supp. 3d 1044 (S.D. Cal. 2015),
19 does not counsel a different result. There, the court on summary judgment rejected the plaintiff’s
20 argument that the defendant “had actual notice of an illegal use of its service and failed to take
21 steps to prevent that use” based on the defendant’s receipt of the complaint in that action and
22 related cases. 141 F. Supp. 3d at 1049. The court stated that “[a] complaint is an allegation of an
23 illegal act, not notice of an illegal act,” and noted that one of the complaints had been voluntarily
24 dismissed. *Id.* at 1049-50. The court found that “[a]n allegation of illegal activity that is
25 subsequently withdrawn serves more to disprove than to prove the illegal nature of the activity,
26 and such an allegation is certainly insufficient to qualify as notice that would give rise to TCPA
27 liability.” *Id.* at 1050. The court further found that the plaintiff did not show that the defendant
28 “received a notice from the FCC regarding illegal activity or other comparable notice.” *Id.* Thus,

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United States District Court
Northern District of California

1 the court determined that the plaintiff failed to demonstrate that the defendant “had sufficient
2 notice of any illegal activity to render it an active participant in that activity.” *Id.*

3 *Kauffman* is distinguishable. First, it was decided on summary judgment where the issue
4 was whether the evidence supported a reasonable inference of actual notice. Here, in contrast, the
5 question is whether the allegations support a reasonable inference of actual notice. For the reasons
6 stated above, they do. Moreover, the subsequent default judgment against MJM in the *Molitor*
7 action constitutes MJM’s admission of facts alleged in the complaint in that action and established
8 MJM’s liability. *See Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977). Thus, unlike
9 the defendant in *Kauffman*, Ytel did not merely have notice of *allegations* of MJM’s illegal
10 activity; MJM’s default in that action established its liability and Plaintiffs’ allegations support a
11 plausible inference that Ytel would have been aware of that liability.

12 Defendant’s insistence that it is a common carrier and thus exempt from TCPA liability is
13 of no moment. Defendant has not identified any authority holding that a common carrier cannot
14 be held liable under the TCPA even if it has been found to have been so involved in the unlawful
15 communications that it can be deemed to have made them. Indeed, the authority is to the contrary.
16 *See, e.g., Linlor v. Five9, Inc.*, No. 17CV218-MMA (BLM), 2017 WL 2972447, at *4 (S.D. Cal.
17 July 12, 2017) (noting that “[c]ommon carriers are not liable under the TCPA *absent* a high degree
18 of involvement or actual notice of an illegal use and failure to take steps to prevent such
19 transmissions”) (emphasis added) (internal quotation marks and citation omitted).

20 CONCLUSION

21 For the reasons set forth above, the Court DENIES Defendant’s motion to dismiss.

22 This Order disposes of Docket No. 21.

23 **IT IS SO ORDERED.**

24 Dated: March 10, 2020

25 
26 JACQUELINE SCOTT CORLEY
27 United States Magistrate Judge
28

EXHIBIT B

Case 4:19-cv-00494-SDJ-CAN Document 90-1 Filed 07/22/20 Page 1 of 2 PageID #: 485
Exhibit A

**US DISTRICT COURT
Eastern District of Texas**

) Craig Cunningham
) Plaintiff, Pro-se
)
) v. Civ Action 4:19-cv-00494
)
) Manasseh Jordan Ministries, Inc., et al
) Defendants.

Plaintiff's Subpoena Instructions to Ytel, inc

My name is Matt Grofsky and I am making this affidavit as the custodian of records for Ytel, Inc.

Based on my knowledge of Ytel's business records practices and procedures, the enclosed records are a true and correct copy of the original documents kept by Ytel in the ordinary course of business.

Based on my knowledge of Ytel's business records practices and procedures, the records were made at or near the time of occurrence of the matters set forth in the records by, or from, information transmitted by a person with knowledge of those matters.

It is the regular practice of Ytel to make such a record of transactions and customer records in the ordinary course of business.

Additionally, in response to the subpoena, we have identified a customer of record and business records which have been produced in response:

Account number 18307.

Company Name: Manasseh Jordan Ministries

Account Created 2013-02-21

Current Status: Active

Account Owner Information

Name: Yakim Jordan

Address: 17121 Collins Ave., Sunny Isles Beach, FL 33160

Phone: 845-598-9974

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email: fj@prophetmanassch.com

Documents Produced

We have attached the requested call records from account 18307 to the numbers requested in the subpoena.

Excel filed titled "SUPT 15517- CompanyID 18307-CDR to 3 Numbers.csv",

all caller ID's associated with account 18307, Excel filed titled "SUPT 15517- CompanyID18307-Numbers.csv",

and billing transactions associated with account 18307. Excel file titled "SUPT 15517- CompanyID 18307-Transactions.csv"

These attachments are included as excel spreadsheets.

I declare under the penalty of perjury that the foregoing is true and correct.

Date 4/29/2020

By 

Matt Grofsky, CTO

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USPS Corporate Acct. No. Federal Agency Acct. No. or Private Service* Acct. No.

ORIGIN (POSTAL SERVICE USE ONLY)

PO ZIP Code **48180** ☒ Day ☐ Night ☐ Priority ☐ Express
Scheduling Priority Date (MM/DD/YYYY) **11-24-20** **26.35**
Date Accepted (MM/DD/YYYY) **11-23-20** ☐ 10:00 AM ☐ 1:00 PM ☐ 3:00 PM
Time Accepted **9:05** AM ☐ PM
Insurance Fee \$ COD Fee \$
10:00 AM Delivery Fee \$ Return Receipt Fee \$
11:00 AM Delivery Fee \$ Use Annual Transportation Fee \$
Special Handling Fee \$ Sunday Holiday Postmark Fee \$ Total Postage & Fees \$ **26.35**

DELIVERY (POSTAL SERVICE USE ONLY)

Delivery Attempt (MM/DD/YYYY) Time ☐ AM ☐ PM Employee Signature
Delivery Attempt (MM/DD/YYYY) Time ☐ AM ☐ PM Employee Signature

LABEL 11-8, MARCH 2018

PSN 7690-02-000-8938



* Money Back Guarantee to U.S., select APO/FPO/DPO, and select International destinations. See DMH and IMM at ps.usps.com for complete details.
* Money Back Guarantee for U.S. destinations only. * For Domestic shipments, the maximum weight is 70 lbs. For international shipments, the maximum weight is 4 lbs.

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